
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BILL WALKER,

Plaintiff-Appellant

v.

MEMBERS OF CONGRESS OF THE UNITED STATES,
as Individuals and in their Official Capacities;
JOHN W. SNOW, Secretary of the Treasury,
in his official capacity; MARK W. EVERSON,
IRS Commissioner, in his official capacity,

Defendants-Appellees

ON APPEAL FROM THE JUDGMENT OF
THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON

BRIEF FOR THE APPELLEES

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 05-35023

BILL WALKER,

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v.

MEMBERS OF CONGRESS OF THE UNITED STATES,
as Individuals and in their Official Capacities;
JOHN W. SNOW, Secretary of the Treasury,
in his official capacity; MARK W. EVERSON,
IRS Commissioner, in his official capacity,

Defendants-Appellees

ON APPEAL FROM THE JUDGMENT OF
THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON

BRIEF FOR THE APPELLEES

STATEMENT OF JURISDICTION

On September 20, 2004, Bill Walker (taxpayer) filed a complaint in the United States District Court for the Western District of Washington against the members of the United States Congress, in their individual and official capacities, and against John W. Snow, the Secretary of Treasury, and Mark W. Everson, Commissioner of Internal Revenue, in their official capacities, asserting that they had violated the United States Constitution by failing to call a constitutional convention to consider repeal of the Sixteenth Amendment, and seeking to hold them civilly and criminally liable for that failure.

(ER 232-38.)¹ In addition, taxpayer sought "reparation" of federal income taxes that had been "extorted" from him by the defendants. (ER 233.) As discussed infra, pp. 8-14, the District Court lacked jurisdiction over taxpayer's claims.

On November 12, 2004, the District Court issued an order and a judgment, dismissing the case for lack of jurisdiction. (ER 242, 246.) The court's judgment is a final order that disposed of all claims of all parties. On November 14, 2004, taxpayer filed a motion for reconsideration (ER 68), which was denied on November 23, 2004 (ER 244). On January 2, 2005, taxpayer filed a timely notice of appeal. (ER 231, 251.) See 28 U.S.C. § 2107(b); Fed. R. App. P. 4(a). This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Did the District Court correctly dismiss taxpayer's suit because his claim that the defendants unlawfully failed to call a constitutional convention to consider repeal of the Sixteenth Amendment is a nonjusticiable political question, and because he failed to point to any basis for jurisdiction over his claim that he is entitled to "reparation" of taxes?

¹"ER" references are to the pages of appellant's excerpts of record, which is bound with appellant's brief. "CR" references are to the documents in the appeal record, as numbered by the Clerk of the District Court.

STATEMENT OF THE CASE

Taxpayer filed a complaint in the District Court. (ER 232-38.) Shortly thereafter, the court, on its own motion, issued an order to show cause why this case should not be dismissed for a lack of jurisdiction. (ER 239.) Taxpayer responded to that order, but failed to identify a basis for jurisdiction. (CR 7.) Taxpayer then filed 13 motions, asking the court to refer various matters to the United States Attorney General for prosecution, and seeking a writ of mandamus, a permanent injunction, a writ of execution, and a stay. (ER 249-50; see ER 242.)

Prior to the date the Government's answer was due, the District Court dismissed the case for lack of jurisdiction, and denied taxpayer's motions. (ER 242, 246.) Taxpayer filed a motion for reconsideration (ER 68) and, when that motion was denied (ER 244), filed a motion for a stay pending appeal, as well as a motion for default (ER 251). The motion for a stay was denied, and the motion for default was stricken. (ER 245.)

Taxpayer now appeals. (ER 231.)

STATEMENT OF FACTS

In December 2000, taxpayer filed a complaint in the District Court against the United States, along with a motion seeking declaratory and injunctive relief, for the alleged failure of Congress to call a constitutional convention. (ER 29.) The court held that "[i]t is unambiguously clear that the Court does

not have subject matter jurisdiction in this case due to the fact that Plaintiff does not have standing to bring this suit and his complaint raises political questions that are more properly the province of Congress." (ER 30.) Accordingly, the court dismissed the complaint with prejudice, since any amendment would have been futile. (ER 31.) Taxpayer did not appeal.

On September 20, 2004, taxpayer again filed suit in District Court, this time naming the members of the United States Congress, in their individual and official capacities, as well as John W. Snow, the Secretary of Treasury, and Mark W. Everson, Commissioner of Internal Revenue, both in their official capacities. (ER 232.) In his complaint, taxpayer reiterated the contention made in his previous suit, i.e., that the defendants had violated the United States Constitution by failing to call a constitutional convention to consider repeal of the Sixteenth Amendment. He sought to hold them civilly and criminally liable for that failure, and also sought "reparation" of federal income taxes that had been "extorted" from him by the defendants. (Id.) The complaint was served on the United States Attorney on October 5, 2004 (CR 3) and, accordingly, the Government's answer was due on December 4, 2004. Fed. R. Civ. P. 12(a)(3).

On October 8, 2004, the court issued an order to show cause. (ER 239-41.) In that order, the court pointed out that taxpayer's complaint alleged no basis for the court's

jurisdiction. (ER 239.) The court noted that the civil cover sheet attached to the complaint did list several statutes as a basis for the action, but that none of those statutes conferred standing on taxpayer or conferred subject matter jurisdiction over the subject matter of the complaint. (Id.) And although the essence of taxpayer's suit was a claim regarding income taxes, and he had referenced 26 U.S.C. § 7422, which authorizes civil actions for tax refunds, the court noted that taxpayer had not invoked the jurisdiction of the court under that section, nor sought relief available thereunder. (ER 240.) Noting that taxpayer had the burden of establishing a basis for jurisdiction, the court ordered taxpayer to show cause why the action should not be dismissed for a lack of jurisdiction. (ER 240-41.)

Taxpayer filed a response to the court's order (CR 7), and then proceeded to file 13 separate motions (ER 249-50). In nine of those motions, taxpayer asked the court to refer various matters to the United States Attorney General for criminal prosecution, for, inter alia, conspiracy, intimidation and harassment, perjury, inciting rebellion or insurrection, and violating his voting rights. (ER 249-50.) He also filed motions seeking a writ of mandamus compelling defendants to call a convention, a permanent injunction requiring defendants to hold a convention, a writ of execution for reparation of income tax, and a stay of any ruling in the case. (ER 250.)

Prior to the date that the Government's answer was due, the District Court entered an order of dismissal. (ER 242.) In that order, the court held that taxpayer's "response wholly fail[ed] to cure the defects identified in the complaint." (Id.) Moreover, the Court noted that taxpayer's cause of action, although aimed at new defendants, duplicated an earlier case that the court had dismissed with prejudice, because it was "unambiguously clear" that the court did not have subject matter jurisdiction over taxpayer's claim. (Id.) Accordingly, the court dismissed the action for lack of jurisdiction. Taxpayer's 13 motions were stricken. (Id.) Judgment was entered in accordance with the court's decision. (ER 246.)

Taxpayer filed a motion for reconsideration, chiding the court for not giving "sufficient attention" to his suit. (ER 68.) The motion for reconsideration was denied. (ER 244.) Taxpayer then moved for a stay of the judgment pending appeal. (ER 251.) He also moved for default against the defendants for their alleged failure to appear. (Id.) The court entered an order denying the motion for a stay as unnecessary, and striking the motion for default, noting that the case had been dismissed prior to the expiration of the time for the defendants to appear and answer. (ER 245.)

SUMMARY OF ARGUMENT

Taxpayer filed suit in District Court, seeking to hold the defendants civilly and criminally liable for failing to convene a constitutional convention to consider repeal of the federal income tax, and also seeking "reparation" of \$7,333 in federal income tax he claims was "extorted" from him by the defendants.

The District Court correctly dismissed taxpayer's suit. It has long been recognized that the Sixteenth Amendment, which authorizes the federal income tax, was properly adopted and continues to be valid. Moreover, challenges to the procedures concerning ratification of constitutional amendments, and the Sixteenth Amendment in particular, have long been recognized to be nonjusticiable under the political question doctrine. The District Court therefore correctly dismissed taxpayer's claim.

Taxpayer also failed to identify any basis for jurisdiction over his claim that he was entitled to "reparation" of income taxes he claims to have paid. Although taxpayer referenced 26 U.S.C. § 7422, which provides a cause of action for recovery of tax refunds, taxpayer did not invoke jurisdiction under that section or allege that he had met the jurisdictional prerequisites for such a suit, by filing an administrative claim for refund. The District Court therefore correctly dismissed this claim as well.

Finally, members of Congress have absolute immunity from suit for actions taken in the sphere of legislative activity. Dismissal of the members of Congress from this lawsuit therefore is required in any event.

ARGUMENT

THE DISTRICT COURT CORRECTLY DISMISSED THIS SUIT BECAUSE TAXPAYER'S CLAIM THAT THE DEFENDANTS HAD UNLAWFULLY FAILED TO CALL A CONSTITUTIONAL CONVENTION IS A NONJUSTICIABLE POLITICAL QUESTION, AND HE FAILED TO POINT TO ANY BASIS FOR JURISDICTION OVER HIS CLAIM THAT HE IS ENTITLED TO "REPARATION" OF INCOME TAXES HE PAID

Standard of Review

This Court reviews de novo a district court's dismissal for lack of jurisdiction. Hughes v. United States, 953 F.2d 531, 535 (9th Cir. 1992).

- A. The District Court correctly dismissed taxpayer's claim that the defendants had unlawfully failed to call a constitutional convention in order to consider the repeal of the Sixteenth Amendment because it raised a nonjusticiable political question

The Sixteenth Amendment to the Constitution provides that "[t]he Congress shall have power to lay and collect taxes on incomes, from whatever source derived" The Sixteenth Amendment was proposed by Congress in a joint resolution passed in 1909 and subsequently was ratified by the requisite three-fourths of the states. See U.S. Const. art. v. Accordingly, "federal courts have upheld and relied on the Sixteenth Amendment

for more than seventy-five years." United States v. Sitka, 845 F.2d 43, 47 (2d Cir. 1988).

It is the role of Congress to implement the procedures for adopting constitutional amendments (as taxpayer has implicitly recognized by naming the members of Congress in his suit). The Supreme Court therefore has held that issues regarding the procedures employed with respect to constitutional amendments are nonjusticiable under the political question doctrine. See Coleman v. Miller, 307 U.S. 433, 450-56 (1939); Baker v. Carr, 369 U.S. 186, 214-15 (1962); Leser v. Garnett, 258 U.S. 130, 137 (1922). In particular, this Court has refused to consider challenges with respect to the ratification and validity of the Sixteenth Amendment, because it "could not undertake independent resolution of this issue 'without expressing lack of the respect due coordinate branches of government.'" United States v. Stahl, 792 F.2d 1438, 1440 (9th Cir. 1986), quoting Baker v. Carr, 369 U.S. at 217. Courts have unanimously rejected such challenges as nonjusticiable under the political question doctrine. See, e.g., Cook v. Spillman, 806 F.2d 948, 949 (9th Cir. 1986); Miller v. United States, 868 F.2d 236, 241 (7th Cir. 1989); Sitka, 845 F.2d at 47; United States v. Foster, 789 F.2d 457, 462-63 (7th Cir. 1986). It makes no difference that taxpayer does not claim that the Sixteenth Amendment was not properly enacted, but rather that a constitutional convention should have been called to

consider its repeal. In either case, it is the role of Congress to take action with respect to a constitutional convention, not the courts.

Moreover, as the District Court noted, taxpayer's cause of action "duplicates an earlier case which this Court dismissed with prejudice" because it raised a political question. (ER 242.) Although taxpayer named different defendants in this suit (i.e., Members of Congress, the Secretary of the Treasury, and the Commissioner of Internal Revenue), his claim in actuality is against the United States, the same defendant named in his previous suit. See Gilbert v. DaGrossa, 756 F.2d 1455, 1457 (9th Cir. 1985). His claim therefore is precluded under the doctrine of collateral estoppel. See Clark v. Bear Stearns & Co., Inc., 966 F.2d 1318, 1320 (9th Cir. 1992); Robi v. Five Platters, Inc., 838 F.2d 318, 321 (9th Cir. 1988).²

- B. The District Court correctly held that taxpayer failed to meet his burden of identifying a basis for jurisdiction over his claim that he is entitled to "reparation" of federal income taxes

Taxpayer also failed to identify a basis for jurisdiction over his claim that he is entitled to "reparation" of \$7,333 in income taxes he claims to have paid. Taxpayer asserted his

²The District Court also correctly held (ER 242; see ER 30) that taxpayer failed to establish that he has standing to bring this suit. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 573-76 (1992) (in order to establish standing, plaintiff must show more than generalized interest of all citizens in constitutional governance).

claims against Government officials and the members of Congress in their official capacities, but he has pointed to no waiver of sovereign immunity for bringing those claims. See Balser v. Dep't of Justice, 327 F.3d 903, 907 (9th Cir. 2003); Gilbert, 756 F.2d at 1458; Hutchinson v. United States, 677 F.2d 1322, 1327 (9th Cir. 1982). Taxpayer also has failed to point to any basis for subject matter jurisdiction in the District Court. Hexom v. Oregon Dep't of Transp., 177 F.3d 1134, 1135 (9th Cir. 1999).

"It is the burden of plaintiffs to persuade the federal courts that subject matter jurisdiction does exist." Hexom, 177 F.3d at 1135. The District Court issued an order to show cause (ER 239-41), giving taxpayer an opportunity to point to a basis for jurisdiction over his claim, but he failed to do so. Although taxpayer relied on a variety of criminal and other statutes, he pointed to no cause of action provided by those statutes for bringing his claim, as the District Court correctly recognized. (ER 239-40, 242.) See, e.g., Robinson v. Overseas Military Sales Corp., 21 F.3d 502, 511 (2d Cir. 1994) (criminal statutes provided no cause of action).

Although taxpayer referenced 26 U.S.C. § 7422, which provides a cause of action for civil actions for recovery of tax refunds, taxpayer did not invoke jurisdiction under that section or allege that he had met the jurisdictional prerequisites for such a suit, as the District Court recognized. (ER 240.) For

example, taxpayer failed to point to any administrative claim for refund filed by him. See 26 U.S.C. § 7422(a) ("No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax . . . until a claim for refund or credit has been duly filed . . . accordingly to the provisions of law . . . and the regulations of the Secretary."). Dismissal therefore was required. Quarty v. United States, 170 F.3d 961, 972 (9th Cir. 1999); Boyd v. United States, 762 F.2d 1369, 1371 (9th Cir. 1985).

- C. Dismissal of the members of Congress from this suit is required in any event, because they have absolute immunity from suit for actions taken in the sphere of legislative activity

Taxpayer named as defendants in this suit the members of Congress, both in their individual and official capacities, seeking to compel the Congress to take action to call a constitutional convention.³ But suits against the Congress are

³Taxpayer, however, failed to serve personally the members of Congress in their individual capacities, as required by Fed. R. Civ. P. 4(i)(2)(B). Taxpayer has admitted (see ER 195) that he did not receive waivers of service from the individual defendants, and that he was required to serve them in accordance with Fed. R. Civ. P. 4(e). See Daly-Murphy v. Winston, 837 F.2d 348, 355 (9th Cir. 1987); Simpkins v. District of Columbia Government, 108 F.3d 366 (D.C. Cir. 1997). Rule 4(e) requires personal service (on the individual or at his residence), or as provided by state law. Service also may be made under that provision "by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process." Taxpayer contended that because the U.S. Attorney was authorized by law to represent the defendants, he was "an agent authorized by law to receive service of

(continued...)

barred by sovereign immunity. Keener v. The Congress of the United States, 467 F.2d 952, 953 (5th Cir. 1972). As previously noted, supra, at p. 10, taxpayer failed to identify any waiver of sovereign immunity.

Moreover, the Speech or Debate clause of the Constitution grants absolute immunity to members of Congress for actions taken in the sphere of legislative activity. U.S. Const. art. 1, § 6; Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980); Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 501-03 (1975). The immunity applies whether a suit is for damages or for injunctive relief. Eastland, 421 U.S. at 503. The purpose of the Speech or Debate Clause is to protect members of Congress "not only from the consequences of litigation's results but also from the burden of defending themselves." Dombrowski v. Eastland, 387 U.S. 82, 85 (1967); see also Helstoski v. Meanor, 442 U.S. 500, 508 (1979). Thus, if legislative immunity applies, members of Congress should be dismissed from a lawsuit. Consumers Union, 446 U.S. at 733-34.

³(...continued)
process." (ER 195.) But the fact that the U.S. Attorney may be authorized to represent members of Congress, does not mean that he is authorized to accept service for them in their individual capacities. Cf. Jackson v. Hayakawa, 682 F.2d 1344, 1347-48 (9th Cir. 1982) (service upon public entity insufficient to subject government officials to suit in their individual capacities). Taxpayer's claims against the members of Congress in their individual capacities therefore are subject to dismissal for insufficiency of service of process.

Actions taken with respect to a constitutional convention clearly are actions taken in the legislative sphere. Dismissal of the members of Congress from this lawsuit therefore is required in any event. Cf. Newdow v. U.S. Congress, 328 F.3d 466, 484 (9th Cir. 2003) ("federal courts lack jurisdiction to issue orders directing Congress to enact or amend legislation"), rev'd on other grounds, 524 U.S. 1 (2004).

CONCLUSION

For the reasons stated above, the judgment of the District Court is correct and should be affirmed.

Respectfully submitted,

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APRIL 2005

STATEMENT OF RELATED CASES

Pursuant to Rule 28-2.6 of this Court, counsel for the appellees state that they are not aware of any related case pending in this Court.

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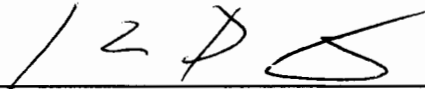
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Dated: April 18, 2005

CERTIFICATE OF SERVICE

It is hereby certified that this brief was mailed to the Clerk by First-Class Mail on this 18th day of April, 2005, and that service of this brief was made on the appellant, appearing pro se, on this 18th day of April, 2005 by sending, by First-Class Mail, two copies thereof in an envelope properly addressed to him as follows:

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